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Telephone Conference

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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JOHN DOE,

Plaintiff,

v.

12 Civ. 9327 (LAK) (AJP)

UNUM LIFE INSURANCE COMPANY OF  
AMERICA,

Defendant.

-----x

New York, N.Y.

July 24, 2013

10:00 a.m.

Before:

HON. ANDREW J. PECK,

U.S. Magistrate Judge

APPEARANCES

RIEMER & ASSOCIATES

Attorneys for Plaintiff

BY: SCOTT RIEMER

BEGOS and HORGAN & BROWN

Attorneys for Defendant

BY: PATRICK BEGOS

(In chambers)

THE COURT: Counsel, this is Judge Peck. Please state your names and each time you speak begin with your name.

MR. RIEMER: Your Honor, this is Scott Riemer for the plaintiff.

MR. BEGOS: Good morning, your Honor. This is Patrick Begos for defendant.

THE COURT: All right. The purpose of this conference is to deal with the motion for a confidentiality order. I know that under Judge Kaplan's procedures it is done as a formal motion, with formal response, etc.

But since he has referred the motion to me and I prefer to deal with discovery motions the traditional Southern District way of premotion conferences, this is that quote-unquote premotion conference, even though the motion is already filed.

I have read the motion. Therefore, Mr. Riemer, why don't you tell me why the confidentiality order should not be entered.

MR. RIEMER: OK, your Honor. Let me just say I am at a bit of a disadvantage because I have been on vacation for the last ten days and haven't started to prepare the opposition yet.

But the reason why it is not confidential are that we will agree to redact the confidential information from the

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1 documents, so there is no need for the entire document to be  
2 subject to a confidentiality agreement because all of the  
3 sensitive information will be redacted out of the documents.

4 THE COURT: Let's take it in pieces. That appears to  
5 deal with the --

6 MR. RIEMER: It deals with -- actually there's two  
7 components.

8 THE COURT: Actually, there seem to be three. So let  
9 me split it up.

10 MR. RIEMER: OK.

11 THE COURT: One is whatever personal information,  
12 particularly health information, there may be about others than  
13 Mr. Doe. With respect to that I take it what you are saying is  
14 that UNUM can redact the names of the other people so that they  
15 are not violating HIPA or the like.

16 Is that what you are saying?

17 MR. RIEMER: That is exactly right.

18 THE COURT: All right. Mr. Begos, does that work for  
19 those documents?

20 MR. BEGOS: Well, it is certainly something that we  
21 are doing, and the parties have agreed that personal  
22 information should be redacted. But it is not sufficient. The  
23 information in the documents is still confidential, and if  
24 Mr. Riemer is permitted free use of this material in any  
25 litigation that he sees fit or in any way that he sees fit, it

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1 increases the possibility that somebody is going to identify  
2 these people.

3 THE COURT: Stop for one minute. Mr. Riemer, is this  
4 something that you are desirous of using beyond this  
5 litigation?

6 MR. RIEMER: Well, what I was prepared to agree to,  
7 and UNUM would not agree to, would be that I would enter into a  
8 protective order saying that I could only use this information  
9 in other cases against UNUM. So this is not something I am  
10 going to put on the web or anything like that or give to any  
11 other attorneys.

12 THE COURT: We are trying to trifurcate the material.  
13 Is there really an argument that you are going to use  
14 any of the medical information in another case against UNUM?

15 MR. RIEMER: Not the medical.

16 THE COURT: OK.

17 MR. RIEMER: Just the fact that these reports are done  
18 by particular doctors. So I am not going to be using it  
19 because of some claimant that's name is now redacted. So this  
20 is only to be used to --

21 THE COURT: Is the only thing you would use it for is  
22 to say that Dr. Moriarity, making up a name, is someone who  
23 makes a lot of money doing reports for UNUM?

24 MR. RIEMER: That is one of the points, yes.

25 THE COURT: What else?

1 MR. RIEMER: Well, also that he opines on various  
2 conditions that he may not have an expertise in, that he uses  
3 boilerplate language in all of his reports.

4 THE COURT: I guess, then, the question is you are  
5 free -- the main dispute on all of this seems to be the use in  
6 other litigation. Obviously, you will know whatever you know  
7 from this information, but in terms of actually using the  
8 physical documents or its ESI -- electronically stored  
9 information -- equivalent, why should you have a leg up in the  
10 next case against UNUM that another lawyer would not have?

11 In other words, if you get 12 reports from my  
12 fictitious Dr. Moriarity in this case and it shows that he is a  
13 hack and in the next case you have for a plaintiff against UNUM  
14 he was examined by Dr. Moriarity or his records were examined  
15 by Dr. Moriarity and you want to make the argument that  
16 Moriarity is a hack, you can request the same information again  
17 in that case. Why should you, as opposed to the next lawyer  
18 who sues UNUM, be able to use information from this case in  
19 other cases?

20 MR. RIEMER: There is two real reasons. One would be  
21 more efficient court administration.

22 THE COURT: Well, the efficient court administration  
23 at the moment is there is a motion in front of me that  
24 shouldn't have been made.

25 What is the second argument?

1 MR. RIEMER: These are ERISA cases. The Supreme Court  
2 in a case called Metlife v. Glenn specifically held that in  
3 deciding ERISA cases an insurance company's conflict of  
4 interest could be taken into account. The Supreme Court said  
5 that one aspect of that would be looking at bad prior conduct  
6 of the insurance company.

7 THE COURT: To the extent that is relevant, in every  
8 case where it is relevant, you will make the appropriate  
9 request for information. Not only that, but you can make it  
10 with a great deal of specificity because you will have had the  
11 information in prior cases. You will just have to obtain it,  
12 again to the extent that UNUM prefers to have to produce  
13 material multiple times in multiple cases.

14 MR. RIEMER: And multiple judges have to go through  
15 the same exercise over and over again.

16 THE COURT: Well, either that is relevant, and any  
17 judge will tell you it is relevant; or, if it isn't, then you  
18 shouldn't be keeping it from one case for use in another that  
19 the judge might not have allowed you to use it in.

20 MR. RIEMER: I am not going to violate a court order  
21 for sure. But the thing is, this information comes up in every  
22 single case.

23 THE COURT: Then you will get it in every single case.

24 MR. RIEMER: But also the burden is on the defendant  
25 to prove that this information is confidential.

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1 THE COURT: But there doesn't seem to be any doubt  
2 that it is confidential. As I understand it, you were agreeing  
3 with them to a confidentiality order.

4 MR. RIEMER: Compromising. I wasn't agreeing.

5 THE COURT: OK. In that case that makes it easy.

6 The Court grants the motion without prejudice to  
7 plaintiff's application that any of the material it receives  
8 that is marked confidential pursuant to the protective order is  
9 not confidential. The burden of making that motion will be on  
10 the plaintiff. The burden of establishing confidentiality  
11 under Rule 26(c) and its case law, however, fully remains on  
12 UNUM.

13 MR. BEGOS: Thank you, your Honor.

14 THE COURT: Anything else from either side?

15 MR. BEGOS: No, your Honor.

16 THE COURT: Mr. Riemer?

17 MR. RIEMER: No.

18 THE COURT: All right.

19 I am going to require both parties to purchase the  
20 transcript. You can go to the Southern District Reporters  
21 website, which is [www.sdreporters.com](http://www.sdreporters.com), and order the transcript  
22 there.

23 In addition, as a matter of courtesy, I will advise  
24 you of what you should know as to the rules, which is pursuant  
25 to 28 U.S. Code, Section 636, you have the option of filing

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1 objections to my ruling with Judge Kaplan. Those objections  
2 must be filed within 14 days or they are waived. And the  
3 14-day period starts running immediately, since you have heard  
4 my ruling, regardless of how long it takes you to purchase and  
5 obtain the transcript.

6 Do you need any sort of written confidentiality order?

7 MR. BEGOS: Your Honor, we had submitted a proposed  
8 protective order with our motion, which I think the only  
9 dispute that Mr. Riemer had was about the use in other  
10 litigation. So from my perspective if your Honor would sign  
11 that proposed protective order, that would be wonderful.

12 THE COURT: All right.

13 Mr. Riemer?

14 MR. RIEMER: Your Honor, I haven't actually read that  
15 yet. That may be the case, but I am not sure that it is.

16 THE COURT: All right. Why don't you read it and call  
17 my secretary within an hour and tell her whether, other than  
18 with respect to the ruling I have already made, there is any  
19 reason why I should not sign the attached proposed protective  
20 order.

21 MR. RIEMER: OK.

22 THE COURT: All right, gentlemen. Thank you.

23 MR. BEGOS: Thank you, your Honor.

24 MR. RIEMER: Thank you.

25 (Adjourned)